IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-606

STATE OF OKLAHOMA,
Petitioner,

v.

ARCHIE L. MASON, ET AL.,
Respondents.

No. 72-654

UNITED STATES OF AMERICA,
Petitioner,

v.

ARCHIE L. MASON, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS

CHARLES A. HOBBS
PIERRE J. LAFORCE
1616 H Street, N.W.
Washington, D. C. 20006

Counsel for Respondents

Of Counsel:

WILKINSON, CRAGUN & BARKER
Washington, D.C.

FILES, MAHAN & WILSON
R. D. MAHAN
Pawhuska, Oklahoma

April 9, 1973

WILSON - EPES PRINTING CO., INC. - NE 7-8003 - WASHINGTON, D. C. 20001

INDEX

CITATIONS

Cases:

CITATIONS—Continued

Statutes:

CITATIONS—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-606

STATE OF OKLAHOMA,
Petitioner,
v.
ARCHIE L. MASON, ET AL.,
Respondents.

No. 72-654

UNITED STATES OF AMERICA,
Petitioner,
v.
ARCHIE L. MASON, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS

Respondents Archie L. Mason and Margaret R. Mason, administrators of the estate of Rose Mason, herewith file their brief in these consolidated cases, in answer to the briefs filed herein by the State of Oklahoma and the United States.

STATEMENT

The statements of the case submitted by the State of Oklahoma and the United States, while substantially accurate, do not fully set forth all the necessary facts. The deficiency lies in two principal areas: (a) new issues raised here by Oklahoma, and; (b) facts relating to the

finding of liability against the United States. To complete the factual record, the following matters should be considered:

1. *Issues raised here by Oklahoma.* For reasons of its own, Oklahoma chose to submit no evidence or file any briefs or memoranda in the litigation below. The only filings made by Oklahoma were its Answer to the Third-Party Petition of the United States and a one-page, two-line "Statement", filed on July 15, 1971. The docket entries show that Oklahoma was fully served with all pleadings and orders. Except for an unannounced appearance at oral argument, the State of Oklahoma made no evidentiary or other presentation below.

2. *Liability of the United States.* Payment of the Oklahoma death taxes at issue here was made by the United States in September, 1967 and December, 1968. The United States paid these taxes without protest and at no time sought a refund of same.

Prior to the payment of these taxes, the United States was on notice that federal courts had construed this Court's decision in *Squire* v. *Capoeman*, 351 U.S. 1 (1956) as exempting Indian trust properties from federal estate tax[1] and from state inheritance tax.[2] The United States was further on notice that in August, 1967, suit had been filed in the Court of Claims (*Beartrack* v. *United States*, Ct.Cl. No. 281-67) for refund of federal estate taxes paid with respect to restricted trust properties of an Osage decedent and that this suit was settled by a full refund of federal estate taxes paid on October 25, 1968.

---

[1] *Nash* v. *Wiseman*, 227 F. Supp. 552 (W.D. Okl. 1963); *Asenap* v. *United States*, 283 F. Supp. 566 (W.D. Okl. 1968). *Asenap* was decided in January, 1968 and final payment of Oklahoma estate taxes in the instant case was not made until December, 1968.

[2] *Kirkwood* v. *Arenas*, 243 F. 2d 863 (9th Cir. 1957).

Shortly after the December, 1968 payment of Oklahoma taxes, the Internal Revenue Service issued a Revenue Ruling (on April 7, 1969) holding that the *Capoeman* rationale immunized Indian trust properties held under the General Allotment Act from federal estate taxation.[3] This was followed by issuance of an IRS Technical Advice Memorandum (on August 15, 1969) specifically holding that the principles of the foregoing Revenue Ruling were fully applicable to trust properties held under the Osage Allotment Act.[4]

SUMMARY OF ARGUMENT

I. *West* v. *Oklahoma Tax Comm'n*, 334 U.S. 717 (1948) was effectively, but not expressly, modified by this Court's later decision in *Squire* v. *Capoeman*, 351 U.S. 1 (1956). The *Capoeman* decision wholly undercut one of the basic decisional premises of *West*, thus removing its precedential value in at least one vital respect, namely, on the question of whether Osage trust property is subject to "direct" taxes. The unanimous interpretation of the effect of *Capoeman* by the lower federal courts and by the Justice Department, the Interior Department and the Internal Revenue Service confirms that *Capoeman*, not *West*, is the controlling precedent in the instant case. While the *Capoeman* case dealt with the provisions of the General Allotment Act, the Osage Allotment Act is essentially indistinguishable for tax purposes, and so property held in trust under either Act would be equally exempt from taxes.

---

[3] Rev. Rul. 69-164, 1969-1 Cum Bull. 220. The Ruling stated, in pertinent part:

> The *Capoeman* case is considered by the Internal Revenue Service to support an exemption from an estate tax because imposing a Federal estate tax is as likely to deplete the property that the United States has undertaken to convey undiluted and undiminished as imposing an income tax.

[4] This Memorandum was referred to by the Court of Claims, 461 F. 2d at 1371 and a copy was attached to our Cross Motion for Summary Judgment.

II. The Court of Claims properly found that the United States was liable for breach of fiduciary duty for failure to act to protect the trust property of its Osage wards. When, as trustee, it paid the tax to Oklahoma in the instant case, the United States was fully aware of the pervasive impact of the *Capoeman* decision, and of the six lower federal court decisions which held that Indian trust property was free from federal and state taxation under the *Capoeman* principles. One of those cases (*Big Eagle*, 1962) actually dealt with Osage trust property, with respect to federal income taxes. In a seventh case, also involving Osage trust property (*Beartrack*, 1968), the United States confessed error and refunded federal estate taxes in that case, and, eventually, all other Osage claims like it. In other words, with respect to *this very tribe* the United States well knew about the effect of *Capoeman*.

Since all the foregoing facts and actions occurred prior to or shortly after the payment of taxes in the instant case, the failure of the United States to take *any* action to contest imposition of taxes on the trust property of Rose Mason was a breach of fiduciary duty to which liability attaches.

III. Several questions raised in the briefs of petitioners were not litigated below or were not raised by the facts of this case. These questions should not be considered for the first time here.

IV. The State of Oklahoma is without jurisdiction to tax Osage trust property. Reference to the relevant statutes and treaty indicate that jurisdiction over the Osage trust estate has never been conferred on Oklahoma. The statutes and treaty leave the trust estate to the exclusive province of the United States and the Osage Tribe. Under *McClanahan* v. *Arizona State Tax Comm'n*, decided March 27, 1973, imposition of Oklahoma taxes on this property is impermissible.

ARGUMENT

I. *WEST* v. *OKLAHOMA TAX COMM'N* SHOULD BE EXPRESSLY MODIFIED.

Except for the *West* case it would be quite clear that the Mason property is not subject to state death taxes. This property is held in trust by the United States under the Osage Allotment Act, which is in the most significant respects the same as the General Allotment Act and entitled to the same tax treatment.[5] The United States concedes, in light of *Capoeman*, that the property is not subject to federal income and death taxes,[6] and that being so, *a fortiori* cannot argue, except based on a blind adherence to the *West* case, that it is subject to state income and death taxes.

We feel it is very probable, if not morally certain, that the *West* case would have come to the opposite conclusion if the Court had been able to take for granted, as an underlying assumption, that the *West* property was *not* subject to *federal* income and death taxes. For, if immune from *federal* taxes, it would *a fortiori* be immune from *state* taxes. On the other hand, assuming the property *was* subject to federal income and death taxes, as the Court did assume (see Court of Claims opinion below, 461 F.2d at 1376), it was almost inevi-

---

[5] *Big Eagle* v. *United States*, 156 Ct. Cl. 665, 300 F. 2d 765 (1962) so held as to federal income taxes. See also *Kirkwood* v. *Arenas*, 243 F. 2d 863 (9th Cir. 1957) and *United States* v. *Hallam*, 304 F. 2d 620 (10th Cir. 1962), construing other allotment acts as *in pari materia* with the General Allotment Act for tax exemption purposes.

[6] The United States no longer collects such taxes from restricted Osages, after having conceded the income tax, and the validity of *Big Eagle*, note 5 above, in *Baconrind* v. *United States*, Ct. Cl. No. 310-66, and having conceded the death tax in *Beartrack* v. *United States*, Ct. Cl. No. 281-67, both settled by stipulation. See also IRS Technical Advice Memo. Aug. 15, 1969, note 4 above.

table to conclude that it was subject to state taxes as well.

This Court in *West* was perfectly correct when it concluded that—

> ". . . should any of the properties transferred be exempted by Congress from direct taxation they cannot be included in the estate for inheritance tax purposes." 334 U.S. at 727-8.

But this Court's further assumption that "No such properties are here involved" has been shown in light of later holdings of this Court to be mistaken. The Court should now correct this part of its *West* decision. We assume that exemption from death and income taxes constitutes, or implies exemption from "direct" taxes.

If the Court will consider, first, what *West* and the earlier precedent of *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598 (1943) (relied upon extensively in *West*) held, and, secondly, what impact the subsequent *Squire* v. *Capoeman* decision had on these holdings, we believe it will agree that *West* must be modified.

A basic holding of the *West* and *Oklahoma Tax Comm'n* cases was that the tax immunity of restricted Indian property could not be based on the "federal instrumentality doctrine",[7] a holding which was recently reiterated by the Court in *McClanahan* v. *Arizona State Tax Comm'n*, decided March 27, 1973. Slip Op. at 6 n.5. We do not question this holding.

---

[7] It had formerly been held, in cases such as *United States* v. *Rickert*, 188 U.S. 432, 437-38 (1903) that the Indian property was exempt from state and local taxes for the reason that this would constitute a tax on "an instrumentality employed by the United States for the benefit and control of this dependent race. . . ." It should be noted that the alternative holding in *Rickert*, that tax immunity was to be implied from the government's undertaking to keep intact the trust estate, was reconfirmed in *Squire* v. *Capoeman*.

West and *Oklahoma Tax Comm'n* departed, however, from the traditional liberal interpretation of the statutory and treaty rights of Indians and held that a clear, express showing of a grant of tax immunity must be made.[8] The *West* opinion also contained certain language which appeared to minimize or relegate to a subordinate consideration the government's trust responsibility and undertakings with respect to Indian property. (See 334 U.S. at 727). Both of these holdings were ignored, and the opposite held, by this Court in the *Capoeman* decision,

In *Squire* v. *Capoeman*, the Court held that the taxability of Indian trust properties could not be considered separate and apart from the treaties and statutes relating to such properties and the government's undertaking with respect thereto. 351 U.S. at 6. In considering whether the General Allotment Act should be construed as conferring tax immunity in that case, the Court reasserted the traditional policy of judicial interpretation concerning Indian rights and immunities,[9] a policy which was not apparent in *West* and *Oklahoma Tax Comm'n*. Applying the liberal approach required by the traditional rule, the Court concluded that immunity from federal income taxation could be implied from the promise of the General Allotment Act that the trust property would be transferred "free of all charge or incumbrance" at the end of the trust period and the further provision that restrictions as to sale, incumbrance

[8] See 334 U.S. at 727; 319 U.S. at 607. The majority opinion on this point in *Oklahoma Tax Comm'n* prompted a vigorous dissent by Mr. Justice Murphy, joined by Chief Justice Stone, Mr. Justice Reed and Mr. Justice Frankfurter on the ground that the majority opinion "rejected a century and a half of history." 319 U.S. at 612.

[9] The Court quoted extensively from *Carpenter* v. *Shaw*, 280 U.S. 363 (1930), which was again cited with approval in the Court's recent *McClanahan* opinion. See Slip Op. at 11.

or taxation would be removed at the termination of the trust. *Id.* at 6-8.

The Court emphasized the government's obligation with respect to preservation of the trust property and held that this commitment to keep the property intact carried with it an implicit tax immuntiy. *Id.* at 9-10. The Court concluded that the social goals sought to be gained from a system of trusteeship of Indian properties would be frustrated by taxation of these properties during the trust period. *Id.* at 10.

Squire v. *Capoeman* thus presented a wholly different approach to the issue of taxation of Indian trust properties than *West* or *Oklahoma Tax Comm'n.* Under the *Capoeman* decision, judicial inquiry into the taxability of Indian property must include a review and analysis of the treaties and statutes pertinent to the terms and conditions under which the United States holds that property or by or under which its use by Indians is restricted. Of controlling significance is the government's undertaking with respect to that property and the congressional purpose to be discerned through its restrictions on Indian properties.

The Osage Allotment Act, 34 Stat. 539, as amended, like the General Allotment Act considered in *Capoeman*, reveals several indicia of tax immunity of Osage trust property.[10] The basic Act provided that, at the termination of the trust period, the trust properties "shall be the absolute property of the individual members of the Osage tribe . . . or their heirs." 34 Stat. 544. The 1912 [11] and 1947 amendments to the statute (37 Stat.

[10] The United States concedes that the Osage Allotment Act is essentially indistinguishable from the General Allotment Act for tax purposes and that it provides the same immunity against federal taxation. Brief of United States, p. 17. See also *Big Eagle* v. *United States*, 156 Ct. Cl. 665, 300 F. 2d 765 (1962).

[11] The 1912 amendment contained a proviso that nothing therein should be construed to exempt the property from tax. The legis-

86, 88; 61 Stat. 747) provided that the Osage trust properties would not be subject "to lien, attachment, or forced sale . . . prior to the issuance of a certificate of competency." 61 Stat. 747. The 1929 and 1938 amendments (45 Stat. 1478-79, 52 Stat. 1034, 1035) directed that the restricted mineral lands "and all royalties and bonuses arising therefrom shall belong to the Osage Tribe of Indians and shall be disbursed to members of the Osage Tribe or their heirs or assigns as now provided by law. . . ." [12]

These specific provisions, coupled with the elaborate trusteeship system created by the Osage Allotment Act, clearly support the concession of the United States and the holdings of the Court of Claims that the *Capoeman* rationale is fully applicable to Osage trust properties. The Act and its amendments clearly reflect a continuing commitment to protect and preserve the trust property,[13] for eventual distribution to the Osages.

Effectuation of the congressional purpose and fulfillment of the government's solemn commitment to its Osage wards, evidenced by the Osage Allotment Act, can only be realized by a finding that the Osage Allotment

---

lative history of the 1912 amendment is quoted in *United States* v. *Mullendore*, 35 F. 2d 78, 82 (8th Cir. 1929) and it shows that the proviso referred solely to the *ad valorem* taxation of the surplus lands which had been authorized by Section 2(7) of the basic statute (34 Stat. 542).

The 1938 amendment also referred to the Secretary paying the Indians' taxes, but again, the legislative history shows that the taxes contemplated were only those on surplus lands. 83 Cong. Rec. 8833 (1938); S. Rep. No. 1798, 75th Cong., 3d Sess. 2 (1938); Hearings on H.R. 8701 Before House Subcommittee on Indian Affairs, May 19, 1938, at 20.

[12] See *Big Eagle* v. *United States*, 156 Ct. Cl. at 677, 300 F. 2d at 771.

[13] The repeated extensions of the trust period further evidence the Congressional concern in this regard. The most recent amendment extends indefinitely the trust over the mineral estate. 78 Stat. 1008.

Act, which contains substantially similar commitments as the General Allotment Act, immunized the trust properties of restricted Osage Indians from Oklahoma death taxes. As pointed out by the Court of Claims below, imposition of state death taxes on these trust properties by Oklahoma, with their possible successive and cumulative impact, poses a real threat that the tribal patrimony of the Osages—which is what these trust properties constitute—will be considerably diminished at the end of the trust period. The *Capoeman* decision commands that this not be allowed to happen.

Nor can the policies of the Osage Allotment Act and the government's solemn obligation to preserve the trust property be frustrated by reference to technical niceties of tax law concerning what incident of ownership is involved in the imposition of a death tax. The *Capoeman* decision instructs that the commitment to maintain and preserve the trust property intact extends to the usufruct of the trust property as well. It follows, *a fortiori*, that that promise provides a tax immunity from state death taxation, which is assessed against both trust corpus and income.

The government argues (Govt. Br., p. 15) that even if the basic property is tax exempt in the hands of the Indian owner, nevertheless this does not mean there cannot be a tax on the transfer of the property. This was also the main theme of the single dissent below.

It is clear from the Osage Allotment Act that the federal supervision and protection of this trust property is to continue until the original owner is declared competent, or until he dies, at which time the trust will terminate as to whatever a competent heir inherits, and will continue as to whatever a noncompetent heir inherits, until that heir is declared competent. Heirs of less than half blood are treated the same as a competent heir. The General Allotment Act provides that the United States will hold the allotment in trust—

> ". . . for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs. . . ." 25 U.S.C. § 348.

The Osage Allotment Act has similar provisions.[14]

Therefore, the words of *Capoeman*—

> "Unless the proceeds of the timber sale are preserved for [the Indian], he cannot go forward when declared competent with the necessary chance of economic survival in competition with others." 351 U.S. at 10.

apply as much to the noncompetent heirs of an allottee as to the noncompetent allottee himself.

The government concedes that the transfer of these Osage properties is not subject to the federal estate tax, and therefore it does not lie for it to suggest that the transfer may be subject to state estate taxes.

Oklahoma raises the issue, for the first time here, that, assuming the heirs of Rose Mason were not restricted Osages, immunity of the trust property of Rose Mason from Oklahoma death taxation would not be required.[15]

---

[14] For example, "When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed", 37 Stat. 87; homestead allotments shall remain tax exempt while title remains in the original allottee "and in his unallotted heirs or devicees of one-half or more of Osage Indian blood . . .", 45 Stat. 1479; "The restrictions concerning lands and funds of allotted Osage Indians . . . shall apply to unallotted Osage Indians born since July 1, 1907 . . . and to their heirs of Osage Indian blood . . .", 45 Stat. 1481; all properties held in trust by or under the supervision of the United States "for the Osage Tribe of Indians, the members thereof, or their heirs and assigns", shall so continue until Jan. 1, 1984, 52 Stat. 1035.

[15] In fact, all of the heirs of Rose Mason were and are uncertificated, non-competent Osage Indians subject to the trust supervision of the United States and, had that issue been raised below, an appropriate showing to that effect would have been made of record.

This argument ignores the thrust of the provisions and policy of the Osage Allotment Act that the trust property will be preserved intact until the property is distributed in fee to the Osage allottee or to his heirs or assigns. The statutory command and the tax implications thereof are clear—the trust property shall not be diminished in any manner until the government's responsibility with respect thereto has ended and that cannot occur until termination of the trust. Thus, the status of an heir of a deceased restricted Osage Indian has no bearing on whether the trust property of that restricted Osage Indian is immune from state death taxation.

Squire v. *Capoeman* announced a fundamentally different approach to the issue of Indian taxation than that utilized in *West* and *Oklahoma Tax Comm'n*. By discarding and rejecting the basic decisional premises relied upon in *West*, the decision in *Capoeman* effectively modified *West* as a viable precedent, at least on the question of whether Osage trust properties are subject to direct taxes. As noted by the Court of Claims, this has been the uniform interpretation of the effect of *Capoeman* by the lower federal courts and by the United States. (See Pet. App., pp. A-10-12, A-19).[16]

Still another ground presents itself as a basis for expressly modifying *West*. While both *West* and *Oklahoma Tax Comm'n* had held that trust properties which were free from direct taxation were likewise free from death taxation, both decisions were premised on the understanding that Indian trust property was subject to direct taxation. That understanding is no longer valid. The impact of this Court's decision in *Squire* v. *Capoeman* has established that Indian trust property of the kind involved here is immune from both federal income

---

[16] This and subsequent references to "Pet. App." are to the Appendix to the Petition for Certiorari filed by the State of Oklahoma.

taxation and federal estate taxation. (Pet. App. A-12) Thus, even applying the *West* holding, it can be found that Osage trust properties are immune from Oklahoma death taxation since, as a result of the *Squire* v. *Capoeman* decision, they are free from direct taxation.

In all, it must be concluded that *Squire* v. *Capoeman*, and not *West* or *Oklahoma Tax Comm'n*, was the controlling precedent and that the Court of Claims was correct in observing that the later decision effectively modified *West*. The time has come to *expressly* modify *West* and respondents respectfully submit that the Court should do so.

II. THE UNITED STATES BREACHED ITS FIDUCIARY DUTY.

As a preliminary matter, it is both disappointing and distressing to note the conclusion of the United States in its brief, at pages 13-15, that it cannot see its way clear to advocate the obvious interests of its Osage wards on the basic issue of the continued imposition of Oklahoma death taxes on Osage trust properties. It is particularly distressing to read that one of the reasons asserted for this unbecoming reluctance is that an overruling of *West* "might well have an adverse impact on the revenue interests of the United States. . . ." (Brief of United States, pp. 13-14). This stance would hardly seem to comport with the duty of undivided loyalty which the law demands of a trustee. It may also be relevant as to why the United States *never* took any action to contest imposition of Oklahoma death taxes on the trust property of Rose Mason or to seek a refund of such taxes, though failure to take this step seems inexplicably inconsistent with its concession that *federal* taxes do not lie.

The Court of Claims concluded that, on the basis of the facts in the instant case, the United States had

breached its fiduciary duty to its deceased Osage ward, Rose Mason, by failing to either contest Oklahoma's imposition of death taxes on its ward's trust property *or* to seek a refund of such taxes. The facts in the instant case amply support this conclusion.

There is no question that the fiduciary duty owed by the United States to its Indian wards is of the highest order. It is also clear that, in furtherance of that duty, the United States has the obligation and the power to protect its Indian wards and to preserve their rights and immunities. See, *e.g.*, *Board of County Comm'rs* v. *Seber*, 318 U.S. 705, 715-17 (1943); *Mott* v. *United States*, 283 U.S. 747, 750 (1931). This obligation has been specifically recognized with respect to the Osages and to suits by the United States to recover state taxes unlawfully imposed on Osage property. See *United States* v. *Board of County Comm'rs of Osage County*, 251 U.S. 128 (1913), *cf.*, *Mashunkashey* v. *United States*, 131 F.2d 288, 291 (10th Cir. 1942), *cert. denied*, 318 U.S. 764 (1943).[17]

The trust responsibilities of the United States require it to take affirmative action, in appropriate circumstances, to protect the trust properties of its Osage wards. Generally applicable trust principles commanded the United States to do what was reasonable under the circumstances, always bearing in mind the nature of the fiduciary duty owed. Breach of that duty by the United States in the instant case is bottomed on its failure to act affirmatively to contest imposition of Oklahoma death taxes when fully on notice of the dramatically altered judicial climate on the issue of Indian taxation, and par-

[17] See also *United States* v. *Dewey County*, 14 F.2d 784 (D.S.D. 1926), *aff'd*, 26 F. 2d 434 (8th Cir.), *cert. denied*, 278 U.S. 649 (1928); *United States* v. *Nez Perce County*, 16 F. Supp. 267, 268 (D. Idaho 1936), *aff'd*, 95 F. 2d 232 (9th Cir. 1938); *cf.*, *Town of Okemah* v. *United States*, 140 F. 2d 963, 974 (10th Cir. 1944); *United States* v. *Charles*, 23 F. Supp. 346, 348 (W.D.N.Y. 1936).

ticularly estate taxation, and on certain administrative action of the United States completely at odds with a continued reliance on *West* v. *Oklahoma Tax Comm'n* as a viable and controlling precedent.

1. *Judicial Decisions.* The opinion of the Court of Claims sets forth the decisions of this Court and the lower federal courts which served as ample notice to the United States that the viability of *West* was so much in doubt that, at the very least, there was a duty to seek a ruling. (See Pet. App. 9-11.) The United States was of course aware of the broad implications of this Court's decision in *Squire* v. *Capoeman*, a decision which it candidly concedes presented a different decisional approach than that of *West*, one which contained "broad and important language concerning implied tax immunities on restricted or trust property", and one which the United States has interpreted "generously." (See Brief for United States, pp. 5, 10, 11.)

Special note should also be taken of the fact that three of the lower federal court decisions had involved the issue of the imposition of death taxes on the restricted or trust properties of Indians. One Court of Appeals decision had held that the *Capoeman* rationale required a finding that the California inheritance tax could not be imposed on Indian trust property.[18] Two federal district court decisions had held that the federal estate tax could not be imposed on Indian trust property.[19] Additionally, the United States was on notice that a suit had been filed in August 1967 to recover federal estate taxes imposed on the trust property of a deceased restricted Osage Indian.[20] Recovery in that suit was premised on

[18] *Kirkwood* v. *Arenas*, 243 F. 2d 863 (9th Cir. 1957).

[19] *Nash* v. *Wiseman*, 227 F. Supp. 552 (W.D. Okl. 1963); *Asenap* v. *United States*, 283 F. Supp. 566 (W.D. Okl. 1968).

[20] *Beartrack* v. *United States*, Ct. Cl. No. 281-67.

the concept that the *Capoeman* rationale immunized Osage trust properties from estate taxation. The Justice Department, presumably with the concurrence of the Internal Revenue Service, settled that case by tendering a full refund of the estate tax imposed. All this action was taken prior to full payment of the Oklahoma estate taxes imposed on the estate of Rose Mason.

In view of these circumstances, there was a duty on the part of the United States to challenge the imposition of Oklahoma death taxes on Osage trust property and to seek a definitive ruling on *West*, if necessary. That duty is not met by asserting that the amount involved was "small" [21] or that the wards themselves could bring suit, or that litigation would have to be undertaken. These assertions ignore the serious and continuing responsibility the United States owes to its Osage wards and it likewise ignores the obvious fact that a successful challenge of West would have redounded to the benefit of *all* restricted Osage Indians, and not simply the estate of Rose Mason.

2. *Administrative Action.* Note has already been taken that the government's confession of error in the *Beartrack* case which occurred prior to final payment of the Oklahoma estate taxes in the instant case. Additionally, some four months after these taxes had been paid, the Internal Revenue Service issued Rev. Rul. 69-164, 1969—1 Cum. Bull. 220, which, applying the *Squire* v. *Capoeman* rationale to the issue of federal estate taxation of Indian trust or restricted properties under the General Allotment Act, held that such properties were

---

[21] The amount of recovery in the instant case is approximately $7,000. While the United States may view this as "small" (Brief of United States p. 13), it is of substantial consequence to those whose trust properties were depleted as a result of the imposition of the Oklahoma estate tax.

immune from federal estate taxation.[22] Four months later, on August 15, 1969, a Technical Advice Memorandum was issued by the Internal Revenue Service stating that the Ruling and the *Capoeman* rationale were fully applicable to Osage trust properties. Notwithstanding these facts and actions of the United States, which were clearly inconsistent with a continued reliance on the precedential value of *West*, the United States never took any action to seek a refund of the Oklahoma estate taxes imposed against the estate of Rose Mason. Nor did the government at any time challenge the imposition of Oklahoma estate taxes on the trust properties of any other restricted Osage Indians. The instant suit was not filed by respondents until December, 1970, over two years after the United States had confessed error in the *Beartrack* case, twenty months after issuance of Rev. Rul. 69-164, and sixteen months after issuance of the Technical Advice Memorandum. In that span of time, the United States did nothing.

The factual record of this case shows that there was abundant notice to the United States that *West* could no longer be relied on and that judicial developments clearly called for a challenge of the imposition of Oklahoma death taxes on Osage trust property. Further, its own administrative action, namely, confession of error in *Beartrack* and issuance of Rev. Rul. 69-164 and the aforestated Technical Advice Memorandum, was completely inconsistent with a continued reliance on *West*. Under these circumstances, it was a breach of the fiduciary duty owed by the United States to fail to take any action with respect to the imposition of Oklahoma estate taxes on the estate of Rose Mason and the Court of Claims properly found that the United States should be held liable.

---

[22] The Court of Claims noted the United States' concession that this Ruling "had the appearance of being contrary to the decision of the Supreme Court in *West*" (Pet. App. A-22, n. 16.)

The Court of Claims found liability on its finding that the United States should have affirmatively acted to contest the imposition of Oklahoma estate taxes on the estate of Rose Mason. The court did not reach our alternative theory of the case that, regardless of questions of negligence or failure to act, the United States breached its fiduciary duty by paying these taxes. The Osage Allotment Act commands the United States to preserve the trust properties of its Osage wards without diminution. The payment of estate taxes to Oklahoma by the United States was a breach of that duty for which it is accountable without regard to questions of negligence.

III. ISSUES NOT RAISED OR DEVELOPED BELOW SHOULD NOT BE CONSIDERED BY THE COURT.

Petitioners, particularly the State of Oklahoma, raise several issues in their briefs which were either not considered in the proceedings below or not raised by the facts in the instant case. In accordance with established rules of judicial procedure, these matters should not be first considered here.

1. *Retroactivity.* The State of Oklahoma argues that, should this Court affirm, the *Mason* decision not be given retroactive effect.

In the first place, retroactivity is not involved in this case. The taxes here were paid in 1968 and 1969, and if a refund is ordered, it will not raise an issue of retroactivity. Oklahoma is really concerned about other cases which are pending. The issue should be reserved until those cases are tried.

In the second place, in its limited participation in the proceedings below, Oklahoma at no time raised this issue nor did it ever introduce into the record any evidence relevant to that issue. The question of retroactivity was not litigated and there was no ventilation or exploration

below of the factors relevant to a determination of that question.

2. *Time of Breach.* Oklahoma also asks this Court to determine an issue which was not raised by this case, but one which may be raised in other pending cases. It asks that the Court make a finding as to when the United States may be said to have breached its fiduciary duty to *other* Osage Indians by not challenging the *West* case. It is incredible that the Court would be asked to decide, without any factual record, questions which are relevant only to parties not before the Court. Respondents respectfully suggest that the Court summarily decline to entertain this question.

Like the retroactivity issue, Oklahoma will have full opportunity to litigate this issue in the pending suits, where it is relevant, should it wish to do so.

3. *Recovery of Interest.* Oklahoma raises, for the first time here, the issue of whether it may be required to pay interest on the tax refund due the respondents. Oklahoma did not present this issue for the consideration of the Court of Claims and it is too late to raise it now. Again, should Oklahoma wish to litigate this issue, it will have ample opportunity to do so in the pending suits.[23]

4. *Reinvested Property.* The United States asks the Court to consider whether the exemption from Oklahoma death taxes found by the lower court should apply to "reinvested property". (Brief of United States, p. 18.) This question was not litigated below and is being raised here for the first time. There is no record evidence concerning whether any "reinvested property" is involved in this case, nor has there been any opportunity to litigate this question. (It is our understanding that none of the

[23] It should be noted that Oklahoma law provides for the payment of 3% interest on refunds of Oklahoma taxes. 68 Okl. Stat. § 225(c).

trust property involved herein is "reinvestment" property, *i.e.*, accumulated income arising from investment of the basic trust properties, or property purchased with such income.) Accordingly, this question, if it does exist, is not properly before the Court.

As is the case with Oklahoma, the United States will have opportunity to litigate this issue if it wishes, in the pending litigation.

IV. OKLAHOMA LACKS JURISDICTION TO TAX OSAGE TRUST PROPERTY.

We asserted below that Oklahoma was without jurisdiction to tax Osage trust property. The Court of Claims did not rule on this point but this Court's recent decision in *McClanahan* v. *Arizona State Tax Comm'n*, decided March 27, 1973, requires us to reassert this point.

Any remaining doubt as to the Osage Indians' liability for Oklahoma estate tax is dispelled by this Court's decision in *McClanahan*, which holds that the State of Arizona lacks jurisdiction to collect state income taxes from earnings of a Navajo Indian on the Navajo Indian Reservation.

We have previously shown that under modern authority the Osage Allotment Act granted the Osages immunity from federal *and* state estate taxes. But aside from this specific tax immunity, the estate tax levy involved in the instant suit must fall under the familiar principle, reaffirmed and clarified in *McClanahan*, that a state generally lacks jurisdiction to tax members of a tribe with respect to transactions occurring or property located on the tribe's reservation.

In *McClanahan*, the Court broadly held that the State of Arizona had no jurisdiction to impose the income tax in question. Starting with the proposition that American Indian tribes are, for some purposes, still to be

regarded as independent sovereignties, the Court noted that the question of the power of the state to impose the tax had to be resolved through analysis of the relevant treaties and statutes "with this tradition of [tribal] sovereignty in mind." Slip Op. at 9-10. The Court then ruled that under the provisions of the Navajo Treaty of 1868, "the reservation of certain lands for the exclusive use and occupancy of the Navajo and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision." *Id.* at 11. Turning then to the Enabling Act under which Arizona entered the Union, the Court pointed out that the Act, by implication, recognized the tax immunity of the tribes within the state and, specifically, precluded the state from assuming jurisdiction over Indians residing on the Navajo Reservation. *Id.* at 11-12. Based on the foregoing and other relevant statutory indicia, the Court held that the imposition of tax would constitute an impermissible interference by the state "with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves." *Id.* at 2.

Application of the test announced in *McClanahan* leads to a conclusion that Oklahoma is without jurisdiction to impose its estate tax on Osage trust properties. These trust properties consist of the tribal mineral estate, the cash proceeds therefrom, and the cash proceeds from the sale of the ancestral Osage lands in Kansas. Even more so than the income in *McClanahan*, these properties are imbued with a tribal nature.

A review of the relevant federal and state enactments confirms that, much like the situation in *McClanahan*, there is ample statutory indicia of the lack of state tax jurisdiction over Osage trust properties. The Osage Reservation was established prior to the time Oklahoma was admitted into the Union. The Act establishing the

Reservation, 17 Stat. 228 (1872), directed that certain lands be "set apart for and confirmed as their reservation" for the Osages and that the purpose of the Act was to provide the Osages "with a reservation". 17 Stat. 229. At that time, the Osages had as much sovereignty over their Reservation as the Navajos had over theirs.

Similarly, as in *McClanahan*, the Enabling Act which governed the admission of Oklahoma into the Union broadly disclaimed jurisdiction over Indians and Indian territory[24] and, as in *McClanahan*, Congress never granted Oklahoma jurisdiction to impose the tax in question.

No federal statute has been found expressly ceding jurisdiction over the Osage Reservation to Oklahoma. The Enabling Act provided for the creation of "Osage County", with the same boundaries as the Osage Indian Reservation (34 Stat. 277) and this has led the state to exercise some measure of jurisdiction within the boundaries of the County-Reservation.[25] However, the creation

---

[24] The Oklahoma Enabling Act provides, in pertinent part (34 Stat. 270):

> That the people inhabiting said proposed State so agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

This disclaimer was carried forward as Article I, Section 3 of the Oklahoma Constitution.

[25] This obviously gave the state jurisdiction over non-Indians on the Reservation, but we do not concede that the state has any jurisdiction over Osage Indians in Osage County. However, the Court need not here decide the question of the full ambit of state sovereignty over the reservation. The only question here is whether the State of Oklahoma ever obtained jurisdiction over the minerals of the Osage Reservation and as we show (*infra*, p. 23) Congress clearly has evinced an intent to guard the Indian status of

of Osage County did not, by and of itself, disestablish the Osage Indian Reservation or end the status of reservation Indian lands as Indian country, *United States* v. *Ramsey*, 271 U.S. 467 (1926).

Of course, once Congress establishes an Indian reservation, its status remains unchanged until Congress decrees otherwise. *United States* v. *Celestine*, 215 U.S. 278, 285 (1909); *Seymour* v. *Superintendent*, 366 U.S. 351, 359 (1962); *New Town* v. *United States*, 454 F.2d 121 (8th Cir. 1972). In the case of the Osage Reservation, Congress has not only refrained from disestablishing the reservation but has taken strong, affirmative steps to preserve the tribal status of the tribe's mineral estate.

The pattern of the Osage Allotment Act and the several amendments thereto has been to maintain the mineral estate underlying the Osage Reservation as *tribal* property.[26] With the exception of a federal statute *permitting* Oklahoma to levy a gross production tax on mineral production on the Osage Reservation, the United States has never permitted Oklahoma to exercise any control or sovereignty over this tribal property.

The federal statutory scheme relating to the mineral reservation also continued the role of the tribal government in the management and control of this part of the Reservation. For example, the Osage Council jointly participates in the making of mineral leases (34 Stat. 543); it approves exchanges of surplus lands among alottees (37 Stat. 86); it determines the bonus value of any tract offered for mineral leasing (61 Stat. 459, 460); it determines the royalties to be paid to the Osage Tribe

---

the Osage mineral estate and keep it free from the burdens of state control and taxation.

[26] In fact, the most recent amendment, extending indefinitely the trusteeship over the mineral estate, refers to that estate as the "Osage mineral *reservation*". 78 Stat. 1008.

under any mineral lease (64 Stat. 215).[27] The State of Oklahoma, we are advised, does not attempt to exercise its usual mineral regulation powers over the Osage mineral reservation, except for the permitted gross production tax.

A further indication of continued Osage tribal sovereignty is that, unlike other Indian tribes in Oklahoma, the United States continues to recognize the reservation status of the Osage Reservation [28] and Indian self-government continues to exist in the Indian villages specifically provided for in the Osage Allotment Act (34 Stat. 542). See 25 C.F.R. Part 74. We are advised that Oklahoma does not attempt to assert its usual police powers within these villages.

While, admittedly, the Osage Reservation today would not appear to possess all the attributes of sovereignty of the Navajo Reservation, nonetheless, it is clear that the Reservation has not been fully terminated and that a residuum of sovereignty remains with the Osage Tribe. This is certainly so with respect to the "Osage mineral reservation."

---

[27] This was a power which had originally been vested in the President. See 34 Stat. 343.

[28] Bureau of Indian Affairs maps show the Osage Reservation as the only Indian reservation left in Oklahoma. According to these maps, all the other reservations have been terminated.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

CHARLES A. HOBBS
PIERRE J. LAFORCE
Attorneys for Respondents

Of Counsel:

WILKINSON, CRAGUN & BARKER

FILES, MAHAN & WILSON
R. D. MAHAN

April 9, 1973